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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

7 United States of America,

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8 Plaintiff,

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9 v.

10 CR 11-098 TUC DCB (DTF)

11 Manuel Plaza-Leon,

12 Defendant,

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14 The Court accepts and adopts the Magistrate Judge's Report and Recommendation  
15 (R&R) (Doc 31) as the findings of fact and conclusions of law of this Court and denies  
16 Defendant's Motion to Suppress Evidence (Doc 15).

17 **MAGISTRATE JUDGE'S RECOMMENDATION**

18 On June 15, 2011, Magistrate Judge D. Thomas Ferraro issued a R&R, recommending  
19 that the Court deny the Defendant's Motion to Suppress Evidence as fruit of an alleged  
20 unlawful detention and for *Miranda* violations.

21 Magistrate Judge Ferraro found no violation of the Fourth Amendment for three reasons:  
22 1) police are permitted to approach individuals in public places and ask questions; 2) the fact  
23 that the arresting officer labeled a DVD recording of the incident as "3-Hispanic males" does  
24 not demonstrate by a preponderance of the evidence that the Defendant was approached solely  
25 because of his race because Officer Yebra articulated legitimate reasons for the contact and  
26 arrest of the Defendant; 3) a criminal defendant cannot suppress his identity, (R&R at 3-5), and  
27 4) the Defendant's fingerprints are admissible because they were obtained to establish his  
28 identity, not as part of a criminal investigation, (R&R at 5-6).

The Magistrate Judge found no Fifth Amendment violation of the right against self-incrimination because the alleged offensive police conduct did not produce evidence of Defendant's identity. Instead, the Defendant responded with a false alias "and, as such, the 'fruits' of the identification evidence are non-existent rather than poisonous," (R&R at 5.)

The parties were sent copies of the R&R and instructed that, pursuant to 28 U.S.C. § 636(b)(1), they had 14 days to file written objections. *See also*, Fed. R. Cr. P. 59(b) (party objecting to the recommended disposition has fourteen (14) days to file specific, written objections).

## **STANDARD OF REVIEW AND CONCLUSION**

The duties of the district court in connection with a R&R are set forth in Rule 59 of the Federal Rules of Criminal Procedure and 28 U.S.C. § 636(b)(1). The district court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” Fed. R. Crim. P. 59(b)(3); 28 U.S.C. § 636(b)(1). “The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.” 28 U.S.C. § 636(b); *see also* Fed. R. Crim. P. 59(b)(3).

Where the parties object to a R&R, “[a] judge of the [district] court shall make a *de novo* determination of those portions of the [R&R] to which objection is made.” 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). When no objection is filed, the district court need not review the R&R *de novo*. *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc). Therefore, to the extent that no objection has been made, arguments to the contrary have been waived. *McCall v. Andrus*, 628 F.2d 1185, 1187 (9<sup>th</sup> Cir. 1980) (failure to object to Magistrate's report waives right to do so on appeal); *see also*, Advisory Committee Notes to Fed. R. Civ. P. 72 (citing *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9<sup>th</sup> Cir. 1974) (when no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation)).

The only objection to the R&R was filed by the Defendant. He objects to the Magistrate Judge's conclusions that the initial stop and questioning of the Defendant was not purely race

1 based, and his fingerprints were taken to establish identity, not to investigate whether he was  
2 illegally in the United States.

3 The Court has considered the objections filed by the Defendant, the Government's  
4 Response, and the parties' briefs considered by the Magistrate Judge on the Motion to Suppress  
5 in respect to the Defendant's objections.

6 **OBJECTIONS<sup>1</sup>**

7 **The Relevant Facts**

8 “In order to satisfy the Fourth Amendment strictures, an investigatory stop or seizure  
9 may only be made if the officer in question has ‘a reasonable suspicion supported by articulable  
10 facts that criminal activity may be afoot . . .’ *United States v. Sokolow*, 490 U.S. 1, 7 (1989)  
11 (internal quotation omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Reasonable suspicion  
12 exists if, in the totality of circumstances, ‘an officer is aware of specific articulable facts, that,  
13 together with rational inferences drawn from them, reasonably warrant a suspicion that the  
14 person to be detained has committed or is about to commit a crime.’ *United States v. Salinas*,  
15 940 F.2d 392, 394 (9<sup>th</sup> Cir. 1991) (citing *United States v. Cortez*, 449 U.S. 411, 416-418  
16 (1981)).” (Motion to Suppress at 4.)

17 The facts relevant to the Defendant's objections follow. On December 16, 2010, Officer  
18 Yebra, with the Tohono O'odham Police, was working the midnight shift (11 p.m. to 7 a.m.)

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19 'Recognizing that 28 U.S.C. § 636(b)(1) makes it clear the district judge must review the  
20 R&R *de novo* only "if objection is made, but not otherwise," the Defendant asserts he, therefore,  
21 "objects to the report and recommendation in its entirety and request de novo review of the  
22 record and evidence." (Objection at 2.) This does not suffice to invoke *de novo* review. "The  
23 filing of objections to a magistrate's report enables the district judge to focus attention on those  
24 issues-factual and legal-that are at the heart of the parties' dispute." *Thomas*, 474 U.S. at 147.  
25 Precluding review of any issue not contained in an objection, prevents a litigant from  
26 "sandbagging" the district judge by failing to object and then appealing. "Absent such a rule,  
27 any issue before the magistrate would be a proper subject for appellate review." Without the  
28 rule requiring parties to object, the district court would have to review every issue in every case,  
no matter how thorough the magistrate's analysis. The rule promotes the efficient use of  
judicial resources. *Id.* It is not enough for a party to file what is essentially a notice of  
objection. Accordingly, the Court reviews *de novo* only the arguments actually raised and  
discussed in the memorandum filed in objection to the R&R and reviews *de novo* the record  
before the Magistrate Judge that pertain to such objections. All other objections are waived.

1 patrolling the San Xavier district. His duties included checking the Desert Diamond Casino for  
2 criminal activity. He testified that early in the course of his shift, he noticed a man, Perez, who  
3 seemed confused or maybe lost. Officer Yebra stopped Perez and asked if he needed assistance.  
4 Perez told Officer Yebra that he was looking for a friend. Officer Yebra directed Perez to  
5 another man, Garcia, who was on the other side of the casino and who Officer Yebra believed  
6 might be Perez' friend because the two men were similarly dressed. (R&R at 2-13.)

7 Officer Yebra observed Perez and Garcia together, off and on, during the course of his  
8 shift. Their conduct was suspicious because they were not gambling. Panhandling and pick-  
9 pocketing are illegal activities that occur at the casino, and Officer Yebra was concerned the  
10 two might be looking for an opportunity to commit such crimes because they were just walking  
11 around. *Id.*

12 Towards the end of his shift, Officer Yebra saw Perez stop a patron and engage him in  
13 what Officer Yebra believed to be panhandling. At that point Officer Yebra approached Perez  
14 and asked him for identification. Perez had none and admitted to being in the United States  
15 illegally. Approximately 60 feet away, Officer Yebra saw Garcia and Defendant Plaza-Leon,  
16 together. Defendant was gambling, and Garcia was watching him. They were talking and  
17 appeared to be acquaintances. Officer Yebra approached Garcia and asked for his  
18 identification. Like Perez, Garcia had none and admitted to being in the United States illegally.  
19 *Id.*; (TR at 17.)

20 During the questioning of Garcia, Defendant moved away to another slot machine and  
21 appeared tense. (TR at 21.) Officer Yebra asked the Defendant if he knew Garcia and Perez,  
22 and the Defendant replied he had just met them. (TR at 24.) Officer Yebra asked for  
23 Defendant's identification. The Defendant said he had a work visa, but had left it at home.  
24 Defendant gave Officer Yebra a false name and date of birth. Officer Yebra was unable to  
25 identify the Defendant, and called border patrol to verify Defendant's work visa status. (R&R  
26 at 37.) It is undisputed that Officer Yebra described the Defendant, Garcia and Perez as  
27 "Hispanic males" in his police reports on the incident and that he captioned a DVD video  
28 recording of his "interrogation" of the Defendant as "3-Hispanic males."

1       Border Patrol Agent Pang responded and processed Defendant as an administrative  
2 immigration matter and determined he was a national of Mexico without documents allowing  
3 him to be in the country legally. (RT 78.) Agent Pang testified that processing is always done  
4 in the first instance administratively. (TR at 84.) Agent Pang completed a field processing  
5 form for a civil immigration violation (Form 826), which informed Defendant of his  
6 administrative rights, some of which are similar to rights under *Miranda*. (TR at 81, 83-84.)  
7 Agent Pang then transported Defendant to the Tucson Coordination Center (TCC) for  
8 processing by other agents. (RT 80-81.) It is undisputed that the Defendant was fingerprinted  
9 at TCC, without ever being advised of his *Miranda* rights.

10      At some point before Agent Pang arrived, Officer Yebra placed the Defendant in  
11 handcuffs because he looked nervous, and Officer Yebra believed he might try to flee. (TR at  
12 38.) Officer Yebra did not read Defendant his *Miranda* rights. Agent Pang did not read  
13 Defendant his *Miranda* rights.

14      The Government does not dispute that statements made by the Defendant after he was  
15 handcuffed are inadmissible because of the *Miranda* violation. See (R&R at 3 n.3) (reporting  
16 “the Government conceded at oral argument that Defendant’s post-detention, pre-*Miranda*  
17 statements to Officer Yebra and Border Patrol Agent Pang are inadmissible.”) Consequently,  
18 the parties remain at odds regarding the admissibility of the Defendant’s initial response to  
19 Officer Yebra falsely identifying himself and the fingerprint evidence.

20      The Court agrees with the Magistrate Judge that the false statements made by the  
21 Defendant in response to Officer Yebra’s initial contact question asking to see his identification  
22 produced no “fruits” from identification evidence. (R&R at 5.) Additionally, the Defendant  
23 admits the Fourth Amendment applied when the Defendant was handcuffed, not at the time of  
24 the initial contact when Officer Yebra asked him for identification and he responded falsely.  
25 (TR at 90-94.)

26      The admissibility of the fingerprint evidence hinges on Defendant’s assertion that there  
27 was no probable cause for Officer Yebra to handcuff him on the floor of the casino because  
28 “[t]he record is absolutely devoid of any reason to suspect Plaza-Leon of any wrongdoing

1 whatsoever.” (Objection at 8.) Defendant asserts he was merely present in a place where  
2 criminal activity was suspected, which is not sufficient nor is mere association with suspects  
3 sufficient for a seizure or arrest. The record is not, however, devoid of any reason for Officer  
4 Yebra to suspect the Defendant of wrongdoing. The Defendant told Officer Yebra he did not  
5 have his work visa with him, and gave Officer Yebra a false name and date of birth. Officer  
6 Yebra had “a reasonable suspicion supported by articulable facts that criminal activity may have  
7 been afoot” at the point in time he placed the Defendant in custody to determine his identity  
8 because he knew facts suggesting the Defendant was in the country illegally or may have been  
9 lying about his identity. Therefore, there was probable cause to place the Defendant in custody.

10 “Identity evidence is generally not subject to the exclusionary rule.” (Objection at 7)  
11 (citations omitted), (R&R at 5) (citations omitted). Only an egregious violation of the Fourth  
12 Amendment, such as a race based stop, can make the exclusionary rule apply to identity  
13 evidence. (Objection at 7) (citations omitted). Because the Court rejects the Defendant’s  
14 argument that such an egregious violation of the Fourth Amendment occurred in this case, the  
15 exclusionary rule does not apply to evidence of Defendant’s identity including his fingerprints.

16 The Court rejects the Defendant’s argument that fingerprints in an immigration  
17 inspection “are taken to *investigate* one’s immigration history as well as to establish an  
18 individual’s identity. This hybrid purpose for taking an exemplar often results in the criminal  
19 prosecution of the individual, as is the case here.” (Objection at 10) (emphasis in original). The  
20 Defendant’s argument would apply in every case because any immigration inspection can be  
21 described as maybe going either way – a civil immigration violation or criminal violation.  
22 Defendant’s position would essentially make fingerprint evidence investigatory instead of  
23 identity evidence in every immigration case. This is contrary to Agent Pang’s testimony that  
24 “when he went out to the casino he approached it as an administrative immigration matter, (RT  
25 82), and that processing is always done in the first instance administratively, (TR at 84).

26 The Court agrees with the Magistrate Judge. “The fact that Defendant was later charged  
27 with a criminal violation was merely a byproduct of the discovery of his true identity and  
28 *history*, but was not the intended purpose of the fingerprinting.” (R&R at 6) (emphasis added).

*Id.* The Court notes that it is criminal history, not the person's identity, that leads to a criminal prosecution instead of civil removal. The Court finds that under the Fourth Amendment, the fingerprint evidence, like the other identity evidence in this case, is not subject to suppression.

The Defendant also argues the fingerprint evidence should be suppressed because it was taken in violation of *Miranda*. For *Miranda* to apply the Defendant must have been questioned with investigative intent. *United States v. Rodriguez*, 356 F.3d 254, 259 (2<sup>nd</sup> Cir. 2004). Because the Court finds the fingerprints were not taken for investigative reasons, but only to identify the Defendant, a *Miranda* warning was not required prior to fingerprinting the Defendant.

## CONCLUSION

After *de novo* review of the issues raised in the Defendant's objections, this Court agrees with the findings of fact and conclusions of law made by the Magistrate Judge in the R&R for determining the pending Motion to Suppress. The Court adopts it, and for the reasons stated in the R&R, the Court denies Defendant's Motion to Suppress Evidence.

**Accordingly,**

**IT IS ORDERED** that after a full and independent review of the record, in respect to the Defendant's objections, the Magistrate Judge's Report and Recommendation (Doc. 31) is accepted and adopted as the findings of fact and conclusions of law of this Court.

**IT IS FURTHER ORDERED** that Defendant's Motion to Suppress (Doc. 15) is DENIED, except to the extent the Government has agreed to suppression of all statements made by the Defendant after he was taken into custody until after he was advised of his rights under *Miranda*.

**IT IS FURTHER ORDERED** that this matter remains referred to Magistrate Judge D. Thomas Ferraro for all pretrial proceedings and Report and Recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) and the Rules of Practice for the United States District Court, District of Arizona (Local Rules), Rule (Criminal) 58.2.

DATED this 8<sup>th</sup> day of August, 2011.

  
David C. Bury  
United States District Judge